The Only Lonely Remedy

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Affirmative action has been under attack for the last few decades and, as a result, is as misunderstood as it is unpopular. For all of its perceived shortcomings, affirmative action is the only remedy that has been offered to compensate for the injustices resulting from historic and present discrimination. This Essay uses storytelling to expound on the current injury suffered by African Americans as a result of discrimination and explores why the most prevalent legal attacks on affirmative action are wrong.

I. MY GUNNYSACK

My blackness is heavy today. I guess it is heavy every day now, but on some days, I feel the weight more than on others. This morning, I felt it before I got out of bed, which is not unusual. I laid in bed and thought about it. "You have to be black today, Vincene, and someone is going to call you a nigger." After a fluttering shudder, I curled my knees into my chest, pulled the duvet up around my shoulders, and snuggled into my warm waterbed with a sigh.

Before sleep could rescue me, Frankie Beverly and Maze filled the room with a funky beat. Morning music pumped out of the alarm clock on the nightstand. As I lay there, it was impossible to tune out the rhythms. Frankie sang, "Suddenly the things you see got you hurt so bad . . . . How come the things that make us happy, make us sad? . . . Joy and pain . . . sunshine and rain."[1] I struggled upright, shifting my gunnysack. As I moved, I shuffled a little to, "I'm gonna spread my wings . . . feel that happy feeling."[2]

You see, I keep my blackness in a gunnysack that I carry on my back. I do not mean that literally. My blackness is my skin, my hair, my history, my family, my speech, my culture, and things like that which belong to me and those like me. It is the weight of my blackness that I carry in the gunnysack. Everyone in my family has one. In fact, every black person I know has one.

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[1] MAZE, FEATURING FRANKIE BEVERLY, *Joy and Pain*, *on* THE GREATEST HITS OF MAZE (Capitol Records 1989).

[2] MAZE, FEATURING FRANKIE BEVERLY, *Happy Feelin's*, *on* THE GREATEST HITS OF MAZE (Capitol Records 1989).

I remember when it started. The ole bossman handed me a big gunnysack that could hold a hundred pounds of cotton and said, "Here, fill this up." Even though I was little and skinny, I was big enough to carry a gunnysack. Some people get their sacks at two or three years old—I was lucky—I did not get mine until I was five. My choice was to fill that sack up. I mean, I guess I could have died, but because I lived, I started filling up that sack. It was not really heavy at first, but now I am forty, and the sack is full, awkward at times, brimming over and spilling onto my shoulders.

Coincidentally, I got my gunnysack on the same day I first used it, maybe even at the same time. I was walking, minding my own business, going to the store down the street, and—bam—a carload of white boys called out "nigger" as they rode down the street. That hurt. Ole bossman was there and handed me the gunnysack. I put all that hurt in the gunnysack, then and every time since then, until the sack got full. I threw all the hurt that comes from being black into the gunnysack, and then I moved on. But now, the gunnysack is full and heavy, and I sometimes get really tired of carrying it around.

The consequences of having a full sack are pretty grave. Some people do not have full sacks until they are sixty or seventy—those are the blessed people. Either they lived a charmed life, or they learned how not to put things in the gunnysack early. There is even an outside chance that someone figured out how to get some of the hurt out of the sack. Once the sack is full, something has to give. The weight of blackness does not stop coming just because your gunnysack is full. If it confronts you, it is yours, and it is up to you to do something about it. You see, once the sack is full, any new weight that is picked up must be put somewhere else, so it is stored in the heart, the mind, the kidneys, or somewhere. The truth be told, that is the real reason black people do not live as long as white people. When the gunnysack is full and the burdens start getting stored in the body parts, the body starts to fall apart, and people die.[3] It is really hard to figure out what to do with the weight when you have a full gunnysack. The trick is to do something with it that is not destructive—some people have figured that out pretty well.

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[3] *See Racist Slights that Blacks Face Every Day are Linked to Their Higher Illness Rates: Study*, JET, Oct. 20, 1997, at 24. This article reports on a study performed by the University of Michigan Institute for Social Research under the direction of Dr. David R. Williams, Associate Research Scientist. Dr. Williams revealed:

> [M]ajor experiences of discrimination were unrelated to self-assessed ill health. Experiences of everyday discrimination, on the other hand, were positively related to ill health. . . . Our finding that everyday discrimination did greater damage to health than major discrimination is consistent with more general research in the stress area that indicates that day-to-day hassles and irritations have a more negative impact than major stressful life experiences.

Id.

Take Ada, for example. Her gunnysack is full, so she cannot put anything in it. She just does not pick up any additional weight, if she can help it, and most of the time she can. Ada is 72 years old. I am not sure how long her sack has been full, and I doubt if she knows. Based upon how skillfully she keeps from picking up new weight, my guess is her sack has been full a long time. Let me tell you . . .

II. ADA'S STORY

Last week, Ada was in the shoe department at a local store. Ada wears a size five, so shoe shopping is a little stressful for her. At mid-morning, the store was empty, and Ada took her time looking. She then sat down to wait for the saleswoman, who happened to be rearranging stock on the shelves, to come around and help her. After the saleswoman walked past Ada a few times, Ada let go. Ada walked up to the woman and screamed out at the woman's most obvious line of defense, "I want you to call the police right now. I mean right now."

The startled woman gasped at Ada in well-justified fear and asked what was wrong.

Ada shrieked at the top of her voice, "Call the police right now because I am about to cause a real scene up in here, and you are going to need the police to put me out. I been sitting here waiting to be waited on for five minutes while you walk around here and ignore me. You can believe I am sick and tired of your walking around here, so you just call the police now!"

The saleswoman then made a big mistake. She told Ada that she had not seen her. That was the wrong thing to say.

Ada blew up. "You didn't see me? How could you not see me sitting there? How could you not see me walking around this store looking at shoes? I almost bumped into you! It is your job to wait on customers, isn't it? You are not blind, and I am not invisible. You saw me and you're a liar!"

Ada did not let the saleswoman call her a "nigger" without confronting her with it. I do not want to lose anyone here. The saleswoman *did* call Ada a "nigger." She just *did not* use the word. Fifty years ago, everybody black was a nigger. It was widely accepted vernacular. In the nineties, the word "nigger" is taboo. The word is not often spoken in racially mixed company, but people can tell you in any number of ways that you are insignificant, unimportant, and a degenerate that need only be tolerated by society. For instance, consider the saleswoman who ignored Ada—she sent an important message. The saleswoman may as well have said, "You are an insignificant nigger, who probably does not have any money, and I am not going to waste my time waiting on you."

Certainly, some of you are defending the saleswoman. Maybe she really did not see Ada. That is a possibility, but it is far short of a probability. Think about it. The store is empty. Ada was the only customer in the department. The primary job of a salesperson is to wait on customers. A customer walks around a

department and then sits down—the customary signal which means it is time for the salesperson to bring shoes out. The salesperson walks around the department while the customer is browsing and passes by the customer while she is seated. What are the chances that the salesperson did not see that customer? I would say, almost none. In Ada's case, the saleswoman probably saw Ada, she just simply chose not to wait on her.

Some of you will say that the incident may not have had anything to do with race. Maybe the saleswoman did not like short women, or women with little, hard-to-fit feet, or old women. This is possible, but again, not probable. Furthermore, it does not matter to Ada if the insult was based on some other bias. Ada has been black all her life and already has a gunnysack, which is full of the weight of incidents that have happened to her solely because she is black, and she carries it around with her everywhere she goes. Ada knows when she is being treated like a nigger. If she is being treated like a nigger for a reason other than her blackness, it is inconsequential—it all feels the same to Ada.

This incident had a happy ending. The store manager was called upon Ada's demand. There were a lot of apologies, and Ada walked out of the store without picking up any new weight, or at least she picked up a lot less than she could have. Ada's sack is full. She knows that, but she wants to live. She knows there is no more room, so she has to release everything right away. She is good at it. I plan to visit Ada often so I can learn her survival tactics. Ada needs to start a "How to Survive After Your Gunnysack is Full" training camp.

My greatest problem is that I have never figured out how to get anything out of the sack. Once I put something in it, it is there forever. A reliable source told me that historical weight can be discarded. However, no one has told me how to do it, and I am clueless. In the beginning, I did not know the sack had a limited capacity or that I could not get anything out once it was in. If I had known, I would have used a lot more discretion about what I put in the sack. I would have figured out how to keep things out sooner. Forty is too young to have a full sack, unless I were to die early. People whose sacks fill up when they are young often do die early.

I store all new weight in my mind which is why I am slightly insane and sometimes I rant like a woman who does not quite have control. Like Ada, I have found anger to be a useful means of eliminating weight, so that I do not have to store it anywhere. When I get angry and tell someone off, the incident is almost weight-free. Now, I often get angry with an element of control which means I manage to maintain a smile and speak in normal tones. However, I am only forty. By the time I am seventy, I have reason to believe things may be different.

Ada is also mad. I think she must have started storing the excess weight in her mind, too, because she is healthy otherwise. People with full sacks who store the weight in their bodies are usually sick by the time they are seventy. Every now and then Ada starts ranting. She repeats herself and talks loudly. Sometimes she

cusses, flails her arms about, bucks her eyes, and uses exaggerated gestures. Mind you, she also has a sense of humor. I see a bit of Ada in myself. In thirty years, I am sure I will be exactly like Ada—a warm and wonderful grandmother who maintains her property, pays her taxes, volunteers at the soup kitchen, but is functionally mad nonetheless.

The gunnysack that ole bossman gave me to carry the weight of my blackness is already full. Because I must continue to be black if I am to continue to live, I must do something with the new burdens I must bear because of my blackness. If I store them in my mind, I will become insane. If I ventilate, people will call me angry. Either way, those I encounter must now entertain the ravings of a mad, black woman.

I have just told you the gunnysack story. It explains how I feel as I go about my life in America as a person of primarily African descent.[4] I am confronted with issues of race or racism every day. Each time I encounter racism, I have an emotional reaction, and I must do something to restore my peace in order to maintain a productive, enjoyable life. Either I can just store it somewhere in my long-term memory and try not to think about it—that is the gunnysack—or I can leave the incident in current memory and let it preoccupy me, increase my blood pressure, affect the level of adrenaline in my body, or otherwise contribute to a general state of unhealthiness brought on by stress. I have found that when I take immediate action, I can rid myself of the mental anguish of an act of racism much more quickly. When I am lucky, I do not have to store the memory at all. Ada took immediate action, and she had me and everyone else laughing when she told her story. Maybe it is funny because it ends with a brief moment of victory for Ada. She took the incident off of her own shoulders and put it on those of the saleswoman by confronting her and calling the manager. Ada has learned to cope with her blackness. Most African Americans who lead productive lives have some way of dealing with the daily incidents that confront them.

III. RACISM IN RIVERSIDE

Even though there are those who want to deny the prevalence of racism in our society, African Americans confront it daily. For example, this Monday, while innocently reading *USA Today*,[5] I found that the community of Riverside,

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[4] I say "primarily" because as with most Americans, particularly African Americans, my heritage is diverse. My father has French and African ancestry. In fact, my family has traced our French ancestors back to France in the early eighteenth century when the Verduns moved to Louisiana. My first relative with African descent was a mulatto woman born in the states. My mother's heritage is African and Native American. *See* Vincene Verdun, *If the Shoe Fits Wear It: An Analysis of Reparations to African Americans*, 67 TULANE L. REV. 597 (1992).

[5] *See Nationline*, USA TODAY, Jan. 5, 1998, at 3A.

California, was debating whether a predominantly white high school should be named after the great scholar, preacher, civil rights leader, and Nobel Prize winner, Dr. Martin Luther King, Jr. The argument against doing so was that using the name would brand the high school as predominantly black which would disadvantage the school's students.

My immediate reaction to the article and the televised interviews later that day[6] was, "We now elevate overt racism to front page news status, not in the form of condemnation, but as a legitimate deliberation."[7] Racism is so much a part of our society that we do not even identify it when it is presented in such an obvious form. I could not fathom how something so outrageously racist was treated as newsworthy. Of course, the racist premise was excluded, but it is implicit and necessary to complete a logical sequence: (1) Martin Luther King, Jr. was black; (2) a school named after Martin Luther King, Jr. will be presumed to be a predominantly black school; (3) predominantly black schools are inferior to predominantly white schools; and (4) graduates will suffer as evaluators, employers, and colleges assume the school is predominantly black and thus inferior.

Although the third premise was not stated in the article or the interviews, the argument is still implicitly made and is racist. The second premise is also arguably racist. Why should we presume that a school named after a black person is a predominantly black school any more than we presume that a school named after a white person is a white school?

IV. RACISM AS A CURRENT INJURY AND AFFIRMATIVE ACTION AS THE REMEDY

The point I am making with the gunnysack story and the Riverside/Martin Luther King, Jr. issue is that the injury experienced by black people in America as a result of our racist heritage is a current injury. African Americans experience the injury in their daily lives as they contend, in their own way, with racism on the job, at school, in the shopping center, or just walking down the street. Most Americans are aware of the presence of racism and many are willing to acknowledge it. The Race and Politics Survey conducted in 1986 found that one in every two white Americans believe that blacks continue to get fewer of the good

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[6] *See The Today Show* (NBC television broadcast, Jan. 6, 1998); *NBC Nightly News* (NBC television broadcast, Jan. 5, 1998).

[7] I do not believe that such overtly racist commentary is particularly newsworthy. It does more to perpetuate racial division than inform the public. It seems to me that the press is more willing to print stories that encourage racism or discourage affirmative action than it is to print those that support racial cohesiveness and support affirmative action.

things in life than they deserve.[8] Moreover, two in every three white Americans agree that it is harder for blacks to make their own way because of the discrimination and the exploitation that they have suffered. Furthermore, not only do large numbers of whites acknowledge that blacks have been, and continue to be, treated unfairly, but they also see a connection between the unfair treatment and the difficulty in making their own way. In other words, whites who believe slavery and discrimination in the past have made it hard for blacks to work their way up, both socially and economically, are also likely to take the position that the inequities of the past have continued into the immediate present.[9]

Even strong opponents of affirmative action know that racism has current impact. When explaining why white males will get more jobs even in a hypothetical marketplace without current discrimination, Professor Kingsley Browne, citing Douglas Laycock, pointed out, "Two hundred and fifty years of slavery, nearly a century of Jim Crow, and a generation of less virulent discrimination are assumed to have had no effect; the black and white populations are assumed to be substantially the same."[10]

The injury to African Americans has been acknowledged, and a majority recognize that it continues. Most people understand and accept that the root of the evil is in the institution of slavery and the horrible legacy of race hatred it bequeathed to future generations of Americans.[11] Samuel Hopkins, a prominent

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[8] *See* PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE 181 (1993) (supplying a detailed analysis of the Race and Politics Survey). The random-digit telephone survey was conducted by the Survey and Research Center of the University of California, Berkley, from August through October 1986. *See id.*

[9] *See id.* at 114–15.

[10] *Hearing on H.R. 2128 Before the House Subcomm. on Employer-Employee Relations of the House Comm. on Econ. and Educ. Opportunities*, 104th Cong. (1996) (statement of Kingsley R. Browne, quoting Douglas A. Laycock, Statistical Proofs and Theories of Discrimination, 49 LAW & CONTEMP. PROBS. 97, 98 (Autumn 1986)), *reprinted in* Kingsley R. Browne, *Affirmative Action: A Rose by Any Other Name*, 22 OHIO N.U. L. REV. 1125, 1143 (1996). The purpose of Professor Browne's testimony was to support the Equal Opportunities Act of 1995 (H.R. 2128) which is federal, anti-affirmative action legislation. Professor Browne, continuing to cite Professor Laycock, suggested that white males are generally more qualified than white females: "All the differential socialization of little girls that feminists justifiably complain about is assumed to have had no effect; the male and female populations are assumed to be substantially the same." See id.

[11] *See generally* WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812 (Penguin Books 1969) (detailing white males' attitudes towards African Americans during the first two centuries of settlement in what became the United States).

As an example of the great racial divide, Jordan commented:

> Deep rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinction which nature has

eighteenth century minister and author, explained why Americans had insensibly fixed African Americans in their minds as suitable, by nature and by right, for nothing other than slavery by pointing out:

> [W]e have been used to look on them in a mean, contemptible light; and our education has filled us with strong prejudices against them, and led us to consider them, not as our brethren, or in any degree on a level with us; but as quite another species of animals . . . . If we could only divest ourselves of these strong prejudices, which [we] have . . . with our brethren and children, and those of our neighbors.[12]

African Americans are still looked upon in the mean and contemptible light that was used to provide the moral justification for the institution of slavery. Strong prejudices against African Americans are still insensibly fixed in the minds of many Americans, and to them: we are not brethren.

The problem, and great debate for most, is not "is there an injury?," but rather "what, if anything, should be done about it?" The resounding response in the latter half of the twentieth century has been affirmative action. Because economic reparations[13] and even an apology have been scoffed at by our legislators,[14] affirmative action is the only lonely remedy. Lonely, because it has

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> made; and many other circumstances, will divide us into parties, and produce convulsions which will probably never end but in the extermination of one or the other race.—To these objections, which are political, may be added others, which are physical and moral.

Id. at 436 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 138–39 (Pechin ed., 1800)).

[12] *Id.* at 276 (quoting SAMUEL HOPKINS, A DIALOGUE CONCERNING THE SLAVERY OF THE AFRICANS 34 (1776)). Jordan uses this quote from Samuel Hopkins to describe the self-scrutiny of Americans during the Revolutionary War era.

[13] For extensive treatment of the bill introduced by Congressman John Conyers to study the possibility of reparations to African Americans, see generally Verdun, *supra* note 4.

[14] Representative Tony Hall (Democrat-Ohio) introduced a bill in 1997, with eleven white co-sponsors, which simply stated, "That the Congress apologizes to African-Americans whose ancestors suffered as slaves under the Constitution and laws of the United States until 1865." H. Con. Res. 96, 105th Cong. (1997); *see Should the Government Apologize for Slavery*, JET, July 14, 1997, at 8. At the time the Bill was introduced, many black leaders and members of Congress were skeptical. The most repeated criticism was that the apology was not extensive enough. It did not include the racism and legalized segregation that followed emancipation. Others pointed out that the Bill did nothing to redress the effects of slavery on African Americans today. *See id.* at 8–10. The public response to Hall was largely negative. He received hundreds of letters condemning his idea. One man wrote that the government should apologize to him for stripping his great-grandfather of his 435 slaves. *See Furor Over Forgiveness and Healing: A Legislator's Resolution*, STAR TRIBUNE, Aug. 5, 1997, at 4A.

For a conversation about the bill among various black leaders, including Roger Wilkins,

so few friends willing to stand by it and so many vocal enemies.[15]

A. *The Injury Accepted and the Remedy Denied*

Affirmative action is the only remedy that has been offered to correct the injury inflicted historically and presently on African Americans by 250 years of slavery, 100 years of Jim Crow, and a generation of less virulent discrimination. Yet, affirmative action is still being rejected, leaving African Americans remediless. Further, those who oppose affirmative action are aware of this result. When elaborating on why white males will remain at the top of the workforce without affirmative action, Kingsley Browne, a strong opponent of affirmative action, stated, "It would take the skill of one who could reproduce Beethoven's Ninth Symphony on the head of a pin to devise a system which would eliminate the effects of centuries of racial and gender discrimination without taking race and sex into account in the process."[16] While Professor Browne and other opponents of affirmative action accept the injury, they reject the remedy. The question is, "Why?"

I would like to offer two possibilities for this result: (1) the failure of the courts to recognize societal discrimination; and (2) the treatment of white males as a suspect class under the Fourteenth Amendment which, in common nomenclature,

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Clarence J. Robinson (Professor of History and American Culture at George Mason University), Representative John Conyers (Democrat-Michigan), Adjoa A. Aiyetoro (Attorney for The National Coalition of Blacks for Reparations), and Raymond Winbush (Director of the Race Relations Institute at Fisk University), see Betsy Peoples, *A Simple Gesture: The Proposed Apology for Slavery Opens a National Discussion on Race*, EMERGE, Sept. 30, 1997, at 42. The leaders supported an apology plus other action, such as a dialogue on race reparations and long-term concern about and commitment to the future of Africa. When President Clinton, who established The President's Advisory Board on Race to undertake a national discussion on the issue of race, was asked how he felt about an apology, he said, ". . . what I think I should do now is let this advisory board do its work and see what they have to say about the apology issue . . . ." *Interview with Travis Smiley of Black Entertainment Television*, 33 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 1184, 1187–88 (1997).

[15] On the day this Essay was presented, January 8, 1998, at the Association of American Law Schools' Annual Meeting in San Francisco, a rally of several hundred lawyers, law professors, and students marched and rallied in San Francisco in support of affirmative action and against Proposition 209, the anti-affirmative action referendum, which is the law in California at the time of this publication.

[16] *Hearing on H.R. 2128 Before the House Subcomm. on Employer-Employee Relations of the House Comm. on Econ. and Educ. Opportunities*, 104th Cong. (1996) (statement of Kingsley R. Browne, quoting *Abolishing Government Race or Gender Preferences: Hearings Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 104th Cong. (1995) (statement of William T. Coleman, Jr.)), *reprinted in* Browne, *supra* note 10, at 1145.

is known as reverse discrimination.[17]

B. *The Court's Refusal to Acknowledge Societal Discrimination*

The Court's refusal to acknowledge societal discrimination was a pivotal point in the development of remedies for the continuing injury to African Americans.[18] Perhaps Justice Powell articulated the most damaging position in his plurality opinion in *Regents of the University of California v. Bakke*[19] when he almost off-handedly ruled out societal discrimination as the foundation for a race-based remedy. Later in *Wygant v. Jackson Board of Education*,[20] the Court stated: "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[21] But for African Americans, society is the perpetrator[22] and the evil-doer from which redress must be sought. Racism has its roots in the evils of slavery. The injury I suffer daily, my full gunnysack, can be traced to an institution this society created over 400 years ago and the ideology of race inferiority that supported it.

Without identifying the correct perpetrator, society, African Americans are forced to direct their attention to individuals and institutions in order to gain relief,

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[17] Both issues will be treated in the general theoretical sense of reason without intent to undermine the particularities of legal analysis employed to support the legislation and the many judicial decisions that compose affirmative action law or the complexity of public opinion that constitutes the affirmative action debate.

[18] Societal discrimination was recognized in *United Steelworkers v. Weber* when the Court held a demonstration of societal discrimination in general, rather than a showing of actual employer discrimination, was sufficient justification for a voluntary affirmative action plan implemented by an employer when there is manifest racial imbalance in a workforce. 443 U.S. 193, 204 (1979). For discussion of the Court's treatment of societal discrimination in hiring versus government set asides, see Deborah A. Ballam, *Affirmative Action: Purveyor of Preferential Treatment or Guarantor of Equal Opportunity? A Call for a "Revisioning" of Affirmative Action*, 18 BERKELEY J. EMP. & LAB. L. 1 (1997). Professor Ballam gave a grim prognosis for the viability of the *Weber* holding given the Court's denunciation of societal discrimination as a foundation for set asides in *Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). "Thus, societal discrimination as a justification for the plus factor affirmative action plans in employment is in jeopardy." Ballam, *supra* at 17.

[19] 438 U.S. 265 (1978). In *Bakke*, a white male medical school applicant claimed that he had not gained admission to the medical school at the University of California, Davis, because sixteen slots were set aside for minority students. *See id.* at 272–81.

[20] 476 U.S. 267 (1986).

[21] *Id.* at 276.

[22] *See generally* Verdun, *supra* note 4, at 641–44 (suggesting that, despite the difficulty in identifying the perpetrator, a responsible society should bear the cost of reparations to African Americans).

all of which are presumed to be innocent of historical discrimination. It is difficult, if not impossible, to prove discrimination on the individual and institutional level. In *Richmond v. J.A. Croson, Co.*, [23] the Court ruled that it is not enough for individuals or institutions to admit to their wrong. Mere statistical evidence demonstrating that there were no black employees, contractors, or students in the institution was not enough.[24] Carefully performed predicate studies which include market statistics, anecdotal testimony, and historical analyses have been ruled insufficient to demonstrate the existence of historical discrimination.[25] The result is that even though everyone knows that discrimination against blacks was a societal norm, and in many cases supported by explicit laws or customs, institutions which have discriminated against blacks cannot develop programs to remedy the wrong because they cannot prove past discrimination. I know there is societal discrimination because of the gunnysack I carry. Anyone who knows a little United States history knows that the city of Richmond discriminated against blacks, but the Court ruled that it must be proven by an unreachable standard of proof. Even when overwhelming evidence of previous discrimination is offered, pursuant to lengthy predicate studies, courts have found that the standard of proof established in *Croson* has not been met.[26]

Failure to acknowledge societal discrimination is counterintuitive. We all know it happened and most of us know it continues, but we will not acknowledge it. I cannot think of a good reason for the lack of judicial recognition of our discriminatory heritage, particularly given the level of race-hatred experienced and institutionalized in the United States.

Putting it in the context of a newly emancipated group might help the

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[23] 488 U.S. at 480. In *Croson*, the City Councilperson Marsh admitted:

> I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct of the construction industry in this area, and the State, and around the nation, is one which race discrimination and exclusion on the basis of race is widespread.

Id.

[24] In *Croson*, the affirmative action plan adopted by the city was supported by findings that "while the general population of Richmond was 50% black, only 0.67% of the city's prime construction contracts had been awarded to minority businesses . . . [between] 1978 and 1983." *Id.* at 479-80.

[25] In *Associated Gen. Contractors v. Columbus*, 936 F. Supp. 1363, 1371-74 (S.D. Ohio 1996), a thorough predicate study that collected evidence over a two-year period, including statistical analysis and anecdotal evidence, was found to have fallen short of the mandate in *Croson*, and Columbus's affirmative action plan was found unconstitutional due to the city's failure to prove historical discrimination.

[26] *See, e.g., id.*

argument. For example, let us consider South Africa. Would it be ludicrous to suggest that in order to support affirmative action, South African blacks should have to prove that an institution or individual implementing such a program had discriminated against them? Furthermore, that any such program would fail unless hard evidence of discrimination were produced? Can you imagine an affirmative action plan for construction contracts in South Africa failing because the benefited group could not prove that there was an available pool of black contractors who had been discriminated against? We can see, because only a few years have passed since the end of apartheid, that such proof would be nonsensical.[27] When would such a pool of contractors have developed given the history of discrimination? "American apartheid" began its demise in the sixties. Has that thirty years purged the United States of culpability for its apartheid to the extent that it is appropriate to construct barriers to relief for blacks? How long will it be before innocent South African whites cry reverse discrimination based upon their lack of culpability for apartheid?

The South African Constitution has a Non-Discrimination Clause that in some ways parallels the Fourteenth Amendment of the United States Constitution.[28] The South African Bill of Rights provides: "The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[29] That language would appear to leave room for reverse discrimination actions similar to those we have experienced in the United States, but because the drafters of the South African Constitution had the United States experience before it, they sought to eliminate the problem with the following language: "Discrimination on one or more of the grounds listed . . . [above] is unfair unless

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[27] Affirmative Action is controversial in South Africa. *See* C. Richard Scott et al., *Affirmative Action as Seen by Business Majors in the U.S. and South Africa*, SAM ADVANCED MGMT. J., June 22, 1998, at 28 (Study shows more optimism regarding the future economic opportunities among South African blacks than among South African whites.); Randolph Baker, *American South: A Model for South Africa*, THE COM. APPEAL, Oct. 4, 1998, at B6 (South African white males flee the country because of perception of lack of opportunity as a result of affirmative action.); Anthony Mukwita, *Labor-South Africa: Breaking Down Barriers*, INTER PRESS SERVICE, June 22, 1998, *available in* LEXIS, News Library, Inpres File (White South Africans who protest affirmative action claim there is no discrimination in their establishments and that the most qualified people get hired.); Gumisai Mutume, *Economy-South Africa: Affirmative Action—The Only Way Forward?*, INTER PRESS SERVICE, May 20, 1998 (White opposition parties see South African Affirmative Action Programme as reverse discrimination. "Are white males an endangered species? is a question often heard as fears of whites being replaced by blacks grow.").

[28] *See* S. AFR. CONST. ch. 2, § 9(3).

[29] *Id.*

it is established that the discrimination is fair."[30]

The South African Constitution also provides that everyone is equal and entitled to equal protection and benefit of the law.[31] In order to preserve the right to implement programs to remedy past discrimination, the South African Constitution further states: "To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination can be taken."[32]

Taken together these Equal Protection and Non-Discrimination Clauses give the South African government and independent actors room to remedy past discrimination and the effects of apartheid without running afoul of the South African Constitution. An affirmative action program designed to advance blacks who have been disadvantaged by unfair discrimination would not fail due to the South African Equal Protection Clause. Any discrimination experienced by a white as a result of such a program would be fair discrimination under South Africa's Bill of Rights. South Africans decided to approach their new government realistically with the full impact of their discriminatory past in view. The Fourteenth Amendment of the United States Constitution was designed to protect the rights of newly freed blacks. The language is broad enough to permit the courts to allow programs which discriminate against whites if that discrimination is fair and to allow programs which benefit or advance the persons for whom the Amendment was undoubtedly drafted to benefit—blacks. Hiding under the unrealistic cloak of a color-blind country and a color-blind Constitution, our courts have interpreted the Constitution in a manner that defeats the objectives of the Fourteenth Amendment. We have as much to learn from South Africa as they have apparently learned from us.

The Fourteenth Amendment, adopted to protect newly freed slaves from discrimination, is the tool used to deny protection based upon reverse discrimination. In fact, the Fourteenth Amendment has proven much more useful in protecting whites from reverse discrimination and challenging affirmative action than it ever was as a tool to protect blacks from discrimination. In order to protect black people from discrimination, the Supreme Court applied the strict scrutiny standard to claims of racial discrimination. However, in *Bakke*,[33] Justice Powell said that strict scrutiny should apply to all racial classifications. Although strict scrutiny is an appropriate standard when blacks seek redress from discrimination, given the country's history of legalized slavery and *de jure* discrimination, it is hardly an appropriate standard for white males. What have white males suffered that would warrant applying the same standard of review as applied to claims of

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[30] *Id.* § 9(5).

[31] *Id.* § 9(1).

[32] *Id.* § 9(2).

[33] 438 U.S. 265, 299 (1978).

discrimination by black people? There is nothing in white males' collective history that would elevate their claims of discrimination to be deserving of such a high level of protection by the courts. White males have never suffered from slavery or any other form of systematic discrimination. Why then, should a claim of reverse discrimination by a white male enjoy the highest level of scrutiny by the courts?

C. *The Illogic of Reverse Discrimination*

Consider the reason courts apply strict scrutiny to an activity. For the sake of this discussion, assume that higher levels of judicial scrutiny are applied in direct relationship to the need to protect members of a particular class as a result of a history which indicates that there is a propensity to discriminate against it.[34] There has never been a propensity to discriminate against white males. Although language describes the protected class as "race," surely it is not difficult to extrapolate that only the races which have been discriminated against should enjoy the special protection of strict scrutiny. It is humorous to think of white males as a suspect class. This is how it translates: "White males constitute a suspect class that enjoys special protection under the United States Constitution, and any claim of discrimination against white males will be subject to strict scrutiny by the courts." It just does not sound right, does it? White males, who have enjoyed all of the privileges of their whiteness and their maleness,[35] should not be entitled to

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[34] Others have applied different names to the theoretical justification for strict scrutiny, but basically the same general principles are at issue. In an effort to explain when a "discrete and insular minority" should be strictly scrutinized under the Fourteenth Amendment, John Ely suggested that courts should protect those who cannot protect themselves politically and keep finding themselves on the wrong end of the legislature's classifications. *See* John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–79, 152 (1980). Ely argues that strict scrutiny is not appropriate when whites have decided to favor blacks at the expense of white people because it is not "suspect" for a majority to discriminate against itself. *See* John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974). Charles Lawrence argues that racial classifications should be scrutinized when they operate to shame and degrade a class of persons by labeling it as inferior. *See* Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 350 (1987). Whether Ely's Political Process Defect Theory, Lawrence's Stigma Theory, or the Propensity to Discriminate Theory proposed here is employed, white males do not fall within the parameters of the theories. White males have no theoretical basis for enjoying strict scrutiny under the Fourteenth Amendment, other than the fact that "whiteness" is a racial classification.

[35] Several opponents to affirmative action, Kingsley Browne and Douglas A. Laycock, acknowledged that blacks and women would not be able to compete in a fair marketplace without race- and gender-based affirmative action because of the current impact of historical discrimination. *See* Browne, *supra* note 10, at 1142–46.

the highest level of constitutional protection available. If the level of protection has a direct relationship to the propensity to discriminate against a group, it is illogical to make white males a suspect class that enjoys the highest level of judicial scrutiny. Race, as a suspect class, is too broad. White males piggy-backed on the civil rights cases, which began having favorable rulings for blacks in the fifties. In these cases, the courts applied strict scrutiny to protect blacks from discrimination. Inclusion of white males under that umbrella of protection was not a required result, and it does not make any sense. The distinctions between races in this country are too pronounced to lump all races together in one big group when parceling out constitutional protections. There is no identifiable propensity to discriminate against white males; therefore, they should not enjoy suspect classification. There is a high propensity for discrimination against blacks; therefore, they should get special protection.

Frequently, when a rule is applied illogically, skewed results follow—that has happened in reverse discrimination litigation. The use of the broad category of "race," which includes white males, has resulted in the application of a lower standard of review to claims of reverse discrimination when affirmative action applies to women than when it applies to blacks.[36] Both women and blacks have suffered from systematic discrimination, and both should enjoy protection from such discrimination under the Fourteenth Amendment. On the other hand, it is hard to conceive why affirmative action programs that benefit women should enjoy intermediate scrutiny, thus increasing their viability, while those for blacks must withstand strict scrutiny, which has been the kiss of death to many of them. If the need for protection is related to the propensity to discriminate, inarguably there is now, and historically has been, more of a propensity to discriminate against blacks in this country than against women. It is illogical to provide more protection for programs designed to ameliorate historical wrongs to women given this history.

V. CONCLUSION: GETTING IN TOUCH WITH REALITY

Why not acknowledge societal discrimination? Why should we give white males the benefit of the highest level of protection under the Fourteenth Amendment? If we look at South Africa as an example, would it be fair to require every institution to prove that it discriminated and limit remedies to those institutions in which such discrimination could be proved? Would it be fair to deny blacks affirmative action because the programs discriminated against white males?

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[36] Thus, affirmative action programs for women have a greater survivability rate than those for blacks. For example, in *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1989), the affirmative action plan for women survived the charge of reverse discrimination because of the intermediate level of scrutiny, while the program that benefited minorities failed under the strict scrutiny standard.

My answer to each of these questions is a resounding *no*. Slavery lasted twice as long as apartheid, and Jim Crow added additional time to the overt, legally-sanctioned injury suffered by African Americans. The United States has purged itself of wrong-doing to African Americans no more than South Africa has purged itself of wrong-doing to South African blacks. Who among us could argue that a remedy should be unavailable to South African blacks? Likewise, there should be no support for the failure of the United States to provide a remedy to American blacks.

American society is the perpetrator of wrongs against African Americans in the very same sense that the South African society was the author of wrongs against South African blacks. If we do not acknowledge that society is the wrongdoer and make society pay with programs like affirmative action, which is designed to provide relief, and then we use the Fourteenth Amendment—the law designed to protect African Americans—to protect white Americans and defeat affirmative action, legally we have established the unremediable wrong. We are acknowledging that although we know there is an injury, we will not rectify it.

The question is, "Why does the American public reject the only remedy that has been offered?" The short answer, which has grown in popularity in the last decade, is that affirmative action results in preferences that Americans, steeped in values of fairness and equality, cannot reconcile. On closer inspection, that answer must be rejected as a reason because Americans do not always turn away from preferences. The first time Americans got heated over preferences was when they became race-based. In *Hopwood v. Texas*,[37] the Court acknowledged the acceptability of nepotism, classism, athleticism, military service, and others. Because only race-based preferences are objectionable, then perhaps it is safe to say the reason Americans, particularly white Americans, are so opposed to affirmative action is *racism*.[38] Support or rejection of programs that benefit African Americans boil down to these questions: "Are you sympathetic to African Americans as a group?; Are you indifferent to them, or do you dislike them?" According to a study done in 1964, followed up by studies performed in 1986, most whites do not feel that blacks work hard enough to solve their own problems, and as a result, those whites fail to support programs designed to help blacks.[39] Race is still the issue.

In a recent interview, President Clinton was asked, "Do you believe that because of the history of slavery, there will always be a degree of bigotry between the races in this country?" The President responded, "No, not necessarily. I just

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[37] 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (rejecting a race-based preference as unconstitutional and as a violation of the Fourteenth Amendment).

[38] For an extensive study designed to prove that policies toward blacks are issue or value driven rather than race driven, see generally SNIDERMAN, *supra* note 8.

[39] *See id.*

think it's a thing that takes a long time to get over."[40] Accept my testimony on the point, "We are not over it yet."

I carry a gunnysack, today and every day, filled with the baggage associated with dealing with race and racism in American society. That gunnysack is heavy. Sometimes it distracts me, causes fatigue, impacts how I react to a situation, or encourages anger, frustration, hopelessness, stress, or unhealthiness. I know that society, the institution of slavery, and legalized Jim Crow and their legacy are the reasons my gunnysack is so full. My plight is aggravated by my country's refusal to acknowledge that it causes my injury, and its consequent failure to provide a remedy. Affirmative action, the only remedy ever offered, is in jeopardy because of the need to protect white males from discrimination.

In this Essay, I have pointed out the irrationality of causing and acknowledging an injury while refusing to provide a remedy. I used the South African experience to point out the folly of our ways. I do not necessarily believe we have a society that is ready to hear this message. I just wanted to go on record as being one voice that says, "The reasons we give for our failure to provide a remedy for the continuing injury to blacks, as a result of the legacy of slavery and Jim Crow, are out of touch with the reality of our history and make no sense."

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[40] Carl Sferrazza Anthony, *A Son of Arkansas*, AM. LEGACY, Spring 1998, at 21.